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1 THE COURT: Good morning. Please, take your  
2 seats.

3 Let's begin with introductions, beginning with  
4 the plaintiff, please.

5 MR. DiGIOVANNI: Thank you, Your Honor. Frank  
6 DiGiovanni from Drinker Biddle & Reath for all three  
7 plaintiffs, MeadWestvaco, ALM Holdings and Ergon.

8 With me is Nicholas Clifford of the Armstrong  
9 Teasdale firm in St. Louis. Mr. Clifford is representing  
10 MeadWestvaco, as is Mark Thomas, also from Armstrong  
11 Teasdale.

12 Also with me from my firm is Curt Lambert.

13 THE COURT: All right.

14 Mr. Farnan is going to step into the breach?

15 MR. FARNAN: Good morning, Your Honor. Brian  
16 Farnan on behalf of Akzo Nobel Custom Chemicals. With me is  
17 Mary Moken, Richard DeLucia, Michael Loughnane, and Patrick  
18 Birde, all from Kenyon & Kenyon in New York City.

19 We have one preliminary matter to address when  
20 Your Honor is ready.

21 THE COURT: Let's finish introductions.

22 MR. DAY: Thank you, Your Honor. Good morning,  
23 Your Honor. John Day from Ashby & Geddes for Arr-Maz Custom  
24 Chemicals in the 13-1070 case. With me today is Robert Lee  
25 from Alston & Bird, who will be presenting for us, Shri

1       Abhyankar, and Natalie Clayton, all from Alston & Bird in  
2       Atlanta.

3                       Thank you, Your Honor.

4                       THE COURT:   Mr. Farnan.

5                       MR. FARNAN:   Your Honor, the only issue is how  
6       to proceed today.  We recommend that we go term by term, as  
7       we have done in the past.  I believe the plaintiff wants to  
8       go straight for an hour and a half and turn it over to us.  
9       We request to go term by term for the argument.

10                      THE COURT:   Counsel.

11                      MR. DiGIOVANNI:  Briefly, Your Honor.  We  
12       thought it made sense to follow generally the way we briefed  
13       it, especially with a time constraint on these number of  
14       terms, we thought it made sense to have us doing our entire  
15       presentation first.

16                      THE COURT:   We set aside three hours in total.

17                      MR. DiGIOVANNI:  Yes, Your Honor.

18                      THE COURT:   And, Mr. Farnan, why do you think  
19       term by term versus straight through makes sense?

20                      MR. FARNAN:   Given the number of terms, Your  
21       Honor, to keep everyone focused, and for the ease of the  
22       Court.

23                      THE COURT:   You think my attention span is going  
24       to wane?

25                      MR. FARNAN:   I know mine will.

1                   THE COURT: I don't have a vested interest one  
2 way or the other. If you really care, I will make a call.  
3 But I just as soon work on what you think makes the best  
4 sense to present the terms to me. Term by term we do;  
5 entire presentation we do. We have done it all kinds of  
6 ways. The only thing I haven't done is put witnesses on  
7 that witness stand to hear on claim construction. So I  
8 don't care, quite frankly.

9                   MR. DiGIOVANNI: Your Honor, we still believe it  
10 makes sense to go through, if we want to get this finished,  
11 that's the way we think.

12                  THE COURT: We will go straight through.  
13 Plaintiff will have the first word, defense will then speak.  
14 And I will give a response, brief response, unless I  
15 interrupt and we interrupt in a dialogue. So I may blow the  
16 whole thing up. We will see. Let's go.

17                  MR. DiGIOVANNI: Thank you, Your Honor.

18                  Your Honor, Mr. Clifford will begin our  
19 presentation.

20                  THE COURT: Okay.

21                  MR. CLIFFORD: Thank you, Your Honor. We  
22 appreciate the opportunity to speak to you about these claim  
23 constructions.

24                  THE COURT: Do you have anything you want to  
25 pass up?

1 MR. CLIFFORD: May I approach?

2 THE COURT: Yes.

3 All right, counsel.

4 MR. CLIFFORD: Your Honor, today we would like  
5 to begin with a short video, a three-and-a-half-minute video  
6 from the National Asphalt Paving Association, which  
7 introduces warm mix to the Court.

8 THE COURT: This is on the technology by way of  
9 tutorial?

10 MR. CLIFFORD: Yes, Your Honor. I will speak  
11 briefly after the short video.

12 THE COURT: All right. Let's go.

13 (Video played.)

14 MR. CLIFFORD: Thank you, Your Honor.  
15 Appreciate the opportunity to present that video.

16 I would like to speak briefly about the  
17 background on the technology here.

18 This is an asphalt technology relating to  
19 asphalt pavement that's used in roads throughout the United  
20 States and the world.

21 The predecessor to the warm mix technology  
22 that's described in the patents is called hot mix. Hot mix  
23 has been used to make asphalt pavement for many decades.  
24 First used in the United States in the 1860s.

25 There are certain essential components and

1 methods that are well known. Hot mix asphalt uses  
2 approximately 95 percent aggregate and five percent asphalt.  
3 It's typically mixed at temperatures above 300 degrees  
4 Farenheit. And as you see in this picture here, Your Honor,  
5 it is mixed at a hot mix plant using this mixing drum and  
6 burner.

7           There are certain constituent elements that  
8 appear in all asphalt pavement, the first of which is  
9 aggregate, which is a mix of various sizes of rock, that  
10 would include gravel, sand, and stone. Those mixes vary,  
11 however, depending on local conditions and availability.  
12 Sometimes aggregate is mixed into asphalt mixes strictly  
13 using virgin aggregate. Other times there are mixes that  
14 include reclaimed asphalt pavement, or RAP. You will see  
15 that in the patent discussed.

16           Another constituent element of asphalt pavement  
17 is asphalt binder. Binder is known by various names, from  
18 binder to bitumen to asphalt cement, and asphalt by itself.

19           Asphalt binder must be heated in order to be  
20 blended into a mix. Asphalt binder is a form of petroleum  
21 that is found in natural deposits as well as a refined  
22 product derived from crude oil.

23           There are various performance grades of asphalt  
24 cement or asphalt binder. You will see in the specification  
25 discussion of performance grades like PG28. Those relate

1 generally to the high and low temperatures at which that  
2 particular grade of asphalt binder is intended to perform.

3 Another expression relating to asphalt binder is  
4 neat asphalt binder. That refers to unmodified asphalt  
5 binder. Asphalts can be modified with additives such as  
6 polymers, which can be used to address certain adhesion  
7 qualities. Other types of asphalt binders can include  
8 emulsions and additives like antistrips.

9 I mentioned before that these asphalt mixes are  
10 mixed. There is an asphalt plant that is usually located  
11 within the general location of a jobsite where the aggregate  
12 and the asphalt binder are mixed. Once it is mixed -- this  
13 is an image of the mixing drum itself, where you can see on  
14 the right side that the aggregate is loaded above a burner  
15 to heat it. It's then mixed with the RAP, the recycled  
16 constituent. And then the liquid asphalt is mixed in this  
17 turning drum with the aggregate, and then it comes out as  
18 hot mix at the other end.

19 Once it leaves the drum, it then is loaded into  
20 a silo. The silo can be used for temporary storage. And  
21 then it is loaded into trucks like you see here for ultimate  
22 transportation to the site. Once it's transported to the  
23 site, it is loaded into a paving machine. Here is an image  
24 of the paving machine, Your Honor, that is used to lay down  
25 the mix onto the road surface while it is hot.

1                   After the paving takes place, the final step is  
2                   compaction. It must be compacted promptly while the mix is  
3                   still hot in order to achieve the necessary pavement  
4                   densities that are required by the job specifications. If  
5                   it is not compacted properly, there is a risk of pavement  
6                   failure.

7                   There are a number of disadvantages of that  
8                   traditional hot mix technology. The high temperatures that  
9                   are used, 300 degrees or more, can cause the asphalt itself  
10                  to degrade rapidly. Of course, maintaining that high  
11                  temperature can be very expensive for the contractors that  
12                  are mixing the mix.

13                  The high temperatures also cause hazardous  
14                  emissions, which can be harmful to the environment, as well  
15                  as a significant on-the-job exposure for workers.

16                  The use of hot mix can limit the ability to use  
17                  the RAP or the reclaimed asphalt pavement. And the  
18                  temperatures that are required, the high temperatures, are  
19                  hard to maintain, and as a result, in colder weather, it  
20                  doesn't work as well. So there is a limited time window for  
21                  the paving season. And, in fact, because the temperatures  
22                  drop rapidly from hot mix to ambient temperatures, that  
23                  limits the amount of time from the mixing ultimately to the  
24                  compaction. So the time window is relatively short.

25                  So in light of those disadvantages of hot mix,

1 in the late 1990s, a technology called warm mix asphalt was  
2 developed. Warm mix has a basic widely understood meaning  
3 in the asphalt industry. It refers to producing asphalt  
4 mixes using reduced mixing and compaction temperatures  
5 relative to conventional hot mix.

6 There are many advantages to warm mix, Your  
7 Honor. And I would point out that the United States  
8 Department of Transportation Federal Highway Administration,  
9 has for quite some time recognized these advantages, such as  
10 the ones that we have quoted from the FHA'S website on the  
11 screen, Your Honor. This list is very similar to what we  
12 heard in that introductory video.

13 Warm mix technology was first introduced in the  
14 United States in the early 2000s. There are some early  
15 technologies that preceded the technology in the invention  
16 in the patents in suit. Those earlier predecessor warm mix  
17 technologies included foamed asphalt and asphalt emulsions,  
18 among others.

19 Let me talk very briefly, Your Honor, about  
20 these predecessor technologies, because I think they relate  
21 directly to the claims.

22 You will see in the claims mention of foaming,  
23 or foamed, non-foamed binder. Let's talk about what foamed  
24 asphalt is.

25 In foamed asphalt warm mix technology, there is

1 cold water that gets mixed with the hot asphalt in that  
2 drum. And it results in bubbling or foaming of the asphalt.  
3 It's immediately then mixed within that drum that we saw  
4 with the aggregate, but at lower temperatures, which can be  
5 30 to 100 degrees -- or 20 to 30 degrees lower than standard  
6 hot mix temperatures when the foamed asphalt technology is  
7 used. But it had significant drawbacks because of all this  
8 introduction of water into the system.

9 The asphalt binder emulsion technology involves  
10 asphalt, water, and an emulsifier that is mixed using a  
11 special device called a colloid mill, which shears the  
12 asphalt into very tiny microscopic drops that are blended  
13 with the water. And that type of emulsion technology can be  
14 used for lowering temperatures while maintaining the mix of  
15 the water, the emulsifier, and the asphalt.

16 There are many different types of applications  
17 that can be used with this emulsion technology.

18 The disadvantages of those predecessor  
19 technologies led to a development by our team of inventors  
20 that came up with an innovation in mid-2007 that has been  
21 transforming the asphalt industry. They removed the foaming  
22 process from the predecessor warm mix application. They  
23 removed the addition of the water that occurred because of  
24 the foaming, and are using lubricating additives, like  
25 surfactants, which is a type of surface active agent that

1 reduces the surface tension of a liquid in which it is  
2 dissolved. That additive is used to mix with the asphalt  
3 and the aggregate at warm mix temperatures.

4 So these types of additives, Your Honor, you  
5 will see, have a great deal of flexibility. They can be  
6 used on site, where that hot mix plant we saw, these totes  
7 that contain the liquid can be used there, they can be used  
8 at a variety of different locations, ultimately allowing  
9 more flexibility in the ability to create warm mixes. It  
10 also had improvements over the predecessor technologies by  
11 eliminating this need for added water, but was able to  
12 achieve comparable hot mix composition performance  
13 characteristics.

14 There are several different types of these  
15 chemical lubricating additives that are at issue in this  
16 case. MeadWestvaco, one of the plaintiffs, has a product  
17 called Evotherm, Akzo Nobel has a product called RediSet LQ,  
18 and Arr-Maz has a product called Adhere LOF 65-00 with  
19 Cecabase RT 945.

20 I would like to direct your attention now, Your  
21 Honor, to the patents. The patents include a composition  
22 patent, that is the '725 patent, and a method patent, which  
23 is the '466 patent. The '725 patent has previously been  
24 through two reexams before this litigation was initiated.

25 The current claim language that we are going to

1 address today, Your Honor, relates to the language approved  
2 in the reexams that you will see on the reexamination  
3 certificate for the '725 patent.

4 The key components of the composition patent  
5 include binder. Of course, we have talked about that. But  
6 one of the key terms is "essentially water free non-foamed  
7 binder," which I will get to in a minute. The aggregate is  
8 fundamentally the same as what we saw in the presentation on  
9 the background section on hot mix, and lubricating additive.  
10 We will talk about more about what lubricating means today.

11 These are all combined and produced or mixed at  
12 temperatures that are 30 degrees Fahrenheit or more lower  
13 than for a comparable hot mix.

14 The steps of the method patent, the key  
15 components involve mixing of those constituent elements of  
16 binder, aggregate and lubricating additive, all at 30  
17 degrees lower than the comparable hot mixes, and the paving  
18 step and the compacting step are part of the method claims.

19 As I mentioned just a second ago, Your Honor,  
20 the patents set up this comparative structure that involves  
21 taking this warm mix that has been produced at 30 degrees or  
22 more lower than a comparable hot mix temperature for hot mix  
23 that is mixed without the lubricating additive.

24 The method claims have a very similar structure.  
25 One thing I would like to point out is that the patents in

1 suit do not have an absolute temperature range. And as a  
2 result, it's always a comparative range relative to a  
3 comparable hot mix temperature, depending upon the type of  
4 grade of asphalt that's being used. In other words, the  
5 patents set up a structure that is an apples-to-apples  
6 comparison, so that if you are taking a certain type of  
7 asphalt mix you can do it with hot mix at a certain  
8 temperature without the additive, but if you use it  
9 according to the invention, you are able to achieve that  
10 using warm mix temperatures that are 30 degrees or more  
11 lower.

12 Briefly, Your Honor, the defendants, as you  
13 know --

14 THE COURT: Indefiniteness is for another day,  
15 counsel.

16 MR. CLIFFORD: I will go right ahead, Your  
17 Honor.

18 Let me get now to the first claim that is at  
19 issue, Your Honor. That is the "functionally dry and  
20 essentially water-free element."

21 The parties here offer very similar  
22 constructions. The difference here that I would like to  
23 draw your attention to is that the plaintiffs' construction  
24 explains what is meant by the phrase "conventional or known  
25 warm mixes." And we explain it by that parenthetical that

1 is well known to persons of ordinary skill, the reference to  
2 foamed or emulsified warm mixes.

3 So you will see that the language, as it appears  
4 in this representative claim, which, of course, we have up  
5 on the boards here for you to see in their entirety --

6 THE COURT: I have the claims.

7 MR. CLIFFORD: Great. It's a reference to the  
8 asphalt binder itself. The asphalt binder is to be  
9 functionally dry or essentially water free. These two  
10 phrases, Your Honor, compliment each other in reference to  
11 the water content of that asphalt binder. But the  
12 specification is careful to explain that warm mix  
13 composition itself is not intended by these phrases to be  
14 completely free of water. Instead, for example, the water  
15 content of the aggregate may itself still enter the system.

16 We know that rock actually has water content in  
17 it. So we are not intending these phrases, these terms, to  
18 mean completely free of water.

19 THE COURT: So the plaintiff has defined the  
20 terms?

21 MR. CLIFFORD: Exactly, Your Honor. The  
22 expression "functionally dry essentially water free" in the  
23 specification has a section that both the plaintiffs and the  
24 defendants rely upon for their similar constructions. But  
25 what I would point out to Your Honor is that the defendants

1 here have ignored the entirety of this particular section of  
2 the specification. Both parties cite to this particular  
3 highlighted section. But what the defendants ignore is the  
4 rest of the context in which that excerpt appears.

5 Plaintiffs' construction gives true meaning to  
6 the phrase "conventional or known warm mixes" because the  
7 phrase before, which states it's not necessary or essential  
8 to use foamed asphalt binders or emulsified asphalt binders  
9 that are used in conventional warm mix asphalt binder  
10 compositions, mixtures and paving processes, that gives  
11 context to what is said in the very next sentence.

12 The interesting thing about the defendants'  
13 construction, Your Honor, is that they are arguing in their  
14 brief, which we cite here for you, that even their own  
15 construction, which, of course, doesn't have that  
16 parenthetical that we have in ours, would result in the  
17 claims being indefinite. Our view, Your Honor, is that that  
18 is a direct violation of Federal Circuit precedent, which I  
19 cite for you here, Your Honor. We believe that our  
20 construction avoids any sort of indefiniteness problem.

21 That's all I have on essentially water free  
22 function -- "functionally dry, essentially water free." If  
23 you have questions, Your Honor, I will answer them. If not,  
24 I will moved on to the next term.

25 "Non-foamed" is the next term, Your Honor. The

1 principal difference here between the competing  
2 constructions, Your Honor, is that the plaintiffs'  
3 construction, "not produced using a foaming process,"  
4 differentiates prior art that utilizes a foaming process.  
5 So by incorporating the notion of a foaming process into our  
6 proposed construction, we are clarifying that non-foamed  
7 differentiates the invention from the prior art. The  
8 defendants, however, have this litigation-driven focus on  
9 whether the binder contains any foam, which we believe has  
10 to do with an argument, a noninfringement argument, perhaps,  
11 that they are trying to craft around incidental foam that  
12 may appear in the system whenever you mix aggregate with  
13 binder.

14 So here is an example of the claim language,  
15 Your Honor. This claim language here, which uses the phrase  
16 "non-foamed," focuses on the verb for foaming or to foam,  
17 but it uses the past tense of that verb. This necessarily  
18 incorporates a notion of action or a process of foaming. We  
19 believe plaintiffs' construction reflects this active  
20 process. The defendants' proposed construction does not  
21 incorporate the proper meaning of the verb foam. Instead ,  
22 they focus on a noun of that particular word for foam.

23 So with respect to non-foamed, Your Honor, we  
24 want to make sure you understand, of course, what it is that  
25 non-foamed is referring to. And it's the process of foaming

1       that I described earlier. We saw the diagram earlier in the  
2       tutorial portion. This is an example of a device used in  
3       the foaming, that's an attachment through which the asphalt  
4       binder must go before entering into the drum.

5               The specification tells us, Your Honor, that  
6       foamed asphalt is not part of the invention. But it doesn't  
7       say that foam isn't part of the invention or can't be in the  
8       system.

9               What it says, Your Honor, is that foamed, or the  
10      foaming process, is not part of the invention. This excerpt  
11      makes that very clear by stating it's not an essential part  
12      of the foamed asphalt binders. There is no question as to  
13      what that is a reference to. It's a reference to a process  
14      that injects a foam or lubricating aqueous solution.

15             The specification is also very clear by citing  
16      an example that distinguishes between the prior art foamed  
17      process and the invention's non-foamed process. You can see  
18      here in this highlighted Example 5. We know that that is  
19      exactly what they were trying to achieve in the Example 5,  
20      because in the prosecution history it tells us that Example  
21      No. 5 illustrates the difference between a foamed asphalt  
22      binder and a non-foamed asphalt binder.

23             Your Honor, we believe it is clear that persons  
24      of ordinary skill would understand that incidental foaming  
25      is not the same thing as a binder produced using a foaming

1 process.

2 So it's clear, Your Honor, that defendants'  
3 construction simply can't be right. If the claims precluded  
4 even incidental foam, then all embodiments that are in the  
5 patent, all of the examples would be precluded from the  
6 claims, because the defendants, who say that minimum mixing  
7 of additive and binder and aggregate produces foam, that  
8 can't be right, because all the embodiments that are  
9 disclosed in this patent involve the mixing of additive and  
10 binder and aggregate. And the Federal Circuit has made  
11 clear that a construction that excludes all embodiments of  
12 an invention is rarely, if ever, correct.

13 Your Honor, that's all I have on that particular  
14 term. Unless you have any questions, I will move on to the  
15 coated terms.

16 THE COURT: That is fine, counsel.

17 MR. CLIFFORD: Thank you.

18 The key difference here between the plaintiffs'  
19 construction and the defendants' construction is the extent  
20 of coating on the aggregate. The question is, does the  
21 claim require all or substantially all of the surfaces to be  
22 coated, or as the defendants would tell you, literally 100  
23 percent coating of the binder on the aggregate?

24 There are a number of different terms, from  
25 "coated" to "binder coated" to "coated with binder" and

1 "lubricating additive," to "coat" or to "coating." These  
2 all generally reference the notion of coating of the  
3 aggregate.

4 Here is a representative claim term, Your Honor.  
5 You can see, that's exactly how coating is used in the  
6 context of aggregate.

7 Your Honor, plaintiffs' construction, which is  
8 "having binder on all or substantially all surfaces," is  
9 drawn from the specification. The specification is replete  
10 with words that characterize the type of coating on the  
11 aggregate. It uses words like acceptable and well coated  
12 and good coating, adequate coating, thorough coating, and,  
13 of course, 100-percent coating.

14 But the issue here is that our construction  
15 contemplates all of those words. The defendants'  
16 construction, on the other hand, ignores most of those words  
17 in the spec. They focus only on "100 percent."

18 They would have the Court issue an absolute  
19 characterization of the word coating, which we do not think  
20 is reflected in the specification.

21 The defendants complain that plaintiffs'  
22 construction is wrong because it has the word substantially  
23 in it and that that in and of itself would require further  
24 construction. We don't believe that is the case, Your  
25 Honor. In fact, here is a number of cases, which I won't go

1 through in any detail, but I point out to you, Your Honor,  
2 that they have approved the use of "substantial" in a claim  
3 construction where the term substantial or substantially  
4 doesn't actually appear in the claim term itself.

5           Persons of ordinary skill are going to know that  
6 coatings, when they come out of that drum, are not always  
7 going to be a hundred percent perfect. So while the words a  
8 hundred percent does appear in the specification, it's  
9 merely an example. It is not intended, as a fair reading of  
10 the specification would show, to be a limitation to be read  
11 into the claims.

12           Our view, Your Honor, is that the defendants are  
13 cherry-picking this example and not being fairly  
14 representative of the entire description in the  
15 specification. In fact, if you take defendants' proposed  
16 construction to its logical conclusion, what they would  
17 require is a microscopic examination of each particle of  
18 aggregate to determine if it is in fact a hundred percent  
19 coated. That can't be what an ordinary person would  
20 understand coating to mean, Your Honor.

21           Your Honor, that is all I have on that  
22 particular claim term.

23           If you are ready, I will move on to lubricating.

24           THE COURT: Okay.

25           MR. CLIFFORD: Thank you, Your Honor.

1                   Unlike any other term that we are going to talk  
2                   about today, this one has sort of strange bedfellows in the  
3                   sense that the alignment of the parties is a little  
4                   different. The plaintiffs and Akzo Nobel actually agree on  
5                   what the construction of this claim term should be. We  
6                   agree that no construction of lubricating is necessary for  
7                   any of the various lubricating terms.

8                   Arr-Maz stands alone on this one, Your Honor.  
9                   They are arguing that the patent contains an express  
10                  lexicographic definition of lubricating, which we believe --

11                  THE COURT: I never heard that quite referred  
12                  to.

13                  MR. CLIFFORD: Lexicographic.

14                  THE COURT: I like it.

15                  MR. CLIFFORD: Glad I got it out. I stumbled on  
16                  it before.

17                  There are a lot of different lubricating terms.  
18                  I won't go through each one. But generally, you will see  
19                  that our construction here sort of tracks the variations of  
20                  this particular term. And the focus here, of course, is on  
21                  relating lubricating to additives or substances.

22                  So at this point I would like to turn your  
23                  attention to the claim language.

24                  You will see here that lubricating, even in one  
25                  representative claim, such as Claim 25 here, appears

1 numerous times, whether in reference to additive or other  
2 type or the specific examples of the Markush group, like  
3 lubricating surfactant, lubricating non-surfactant,  
4 lubricating additive, and so on.

5 Our view, Your Honor, as both plaintiffs and  
6 Akzo agree, the lubricating terms all have their plain and  
7 ordinary meaning, and there is no need to go any further  
8 beyond that.

9 However, we have, because of this proposed  
10 construction that we faced with Arr-Maz's construction, we  
11 felt it may be necessary for the Court to have an  
12 alternative construction from the plaintiffs. So that's why  
13 we have offered "allowing easier motion between two or more  
14 objects." This alternative construction is simply a way of  
15 explaining what we believe to be the plain and ordinary  
16 meaning of lubricating. It's consistent with the intrinsic  
17 evidence and what the knowledge of a person of ordinary  
18 skill would be.

19 The dictionary, of course, helps with that. But  
20 the defendant Arr-Maz here would have you read into the  
21 meaning of lubricating a very specific, frankly, complex  
22 scientific definition that we do not believe the patentees  
23 intended.

24 Unlike lubricating, the patentees did expressly  
25 define several terms. We mentioned functionally dry

1       essentially water free, and there is another term called  
2       visco-lubricity. If I can direct your attention to two  
3       places where those terms are expressly defined, Your Honor,  
4       you can see the patentees knew exactly how to do that when  
5       they wanted to. They defined them expressly.

6               But that's not what happened with lubricating.  
7       Instead, this definition that we are getting from Arr-Maz is  
8       simply not in the specification. You can't find "providing  
9       a reduction in the normal force of an asphalt binder in an  
10      additive as compared to the normal force of the asphalt  
11      binder without the additive at high rotational velocities"  
12      as a quotation from the specification anywhere.

13              It simply is not a direct quote. It is not an  
14      express definition taken from the specification. Instead,  
15      Your Honor, it is pulled from bits and pieces here and  
16      there, none of which, together or in isolation, are  
17      expressly linked to the word lubricating.

18              Instead, Arr-Maz uses portions of the  
19      specification which are about different terms. So  
20      visco-lubricity is not the same as lubricating.

21              This test, which relates to determining normal  
22      force measurements, is in the specification, but it relates  
23      to the concept of lubricity. It is not a replacement for  
24      the plain and ordinary meaning of the word lubricating.

25              If you have any questions on lubricating, Your

1 Honor, I am done, and I am going to turn the podium over to  
2 my co-counsel, Frank DiGiovanni, for the rest of them.

3 THE COURT: Thank you.

4 MR. CLIFFORD: Thank you, Your Honor.

5 MR. DiGIOVANNI: Good morning, Your Honor. We  
6 start on Slide 58 of our presentation.

7 Mr. Clifford mentioned warm mix in his tutorial.  
8 In fact, the video was entitled Warm Mix. So what you see  
9 in the claims, Your Honor, is the term warm mix used in  
10 several different ways. Principally, "warm mix asphalt  
11 paving composition" or "warm mix paving composition," that  
12 is one when warm mix is described in the composition. The  
13 second way is a "warm mix temperature," as you see here in  
14 Claim 25 of the '725 patent.

15 So they are used the same way. What we have  
16 done in our slides, Your Honor, is just list how each side  
17 is generally characterizing them.

18 There certainly is a difference between the way  
19 plaintiffs are characterizing how we define warm mix and how  
20 defendants do. The way we are defining warm mix is as a  
21 general differentiation from hot mix, because that's the way  
22 the patentee uses it. And that is the way all the intrinsic  
23 and extrinsic evidence uses the term warm mix. It is a  
24 general term that differentiates this type of asphalt from  
25 conventional hot application. I am going to go through and

1 show you the intrinsic evidence in a moment.

2 I do want to note here this little piece of clip  
3 art designates that this was actually a new construction  
4 that we received from defendants. Actually, the first time  
5 we ever saw it was in their answering brief. I want to note  
6 that in our opening brief and our answering brief, we were  
7 unable to address it because the only thing they said is it  
8 was indefinite, and they didn't provide a construction until  
9 that time. I appreciate Your Honor giving us that  
10 opportunity to submit that short and supplemental brief  
11 wherein we address it.

12 As I said, the term warmed mix is a term that is  
13 used to generally distinguish asphalt paving compositions  
14 and processes that use a relatively warmer temperature to  
15 that of conventional hot mix.

16 This slide indicates the difference between the  
17 two. The difference, Your Honor, between plaintiffs' and  
18 defendants' construction -- this is a little graphic just to  
19 illustrate that -- is both, everyone, all parties agree that  
20 warm mix is "at least 30 degrees lower" than something, but  
21 it's that something, that comparison product, or that  
22 comparison composition, that we disagree on.

23 Plaintiffs say it's at least 30 degrees lower  
24 than used in conventional hot mix asphalt. And the language  
25 that defendants use, it may look familiar to Your Honor

1     because they pluck it right out of the patent claims, which  
2     sometimes is the way to go, you look at the claims first,  
3     under Vitronics, but not here, Your Honor, because there is  
4     a general concept of warm mix, and then there is also the  
5     specific comparison that the inventors made in the claims.

6                 So the general concept of warm mix is not  
7     defined by the claim language -- I will call it the claim  
8     comparison language. But it's the general concept of warm  
9     mix that is defined in reference to conventional hot mix.

10                These next couple of slides show you the  
11    particular warm mix terms. We have been calling them the  
12    warm mix terms throughout briefing, just to show you that  
13    it's warm mix temperature, warm mix temperature range.  
14    They all follow the same essential structure, Your Honor.

15                These three, warm mix paving composition, warm  
16    mix asphalt paving composition, and warm mix asphalt binder  
17    composition, all parties agree it should be construed the  
18    same. All three of those terms then are the same. It's  
19    just a matter of which side is right, plaintiffs or  
20    defendants.

21                Plaintiffs again follow their convention of  
22    referring to conventional hot mix. Defendants, again, use  
23    that, they pluck language out of the claim again. I will  
24    get to that in a minute. But that essentially renders the  
25    term warm mix superfluous.

1                   And these are two additional terms that have  
2                   warm mix in it, again, follow the same convention.

3                   Let's take a look at the specification, Your  
4                   Honor, starting with Slide 64.

5                   Looking at the intrinsic evidence, the  
6                   specification, and in the detailed description section, the  
7                   quotes here are from the patent, from the '725 patent, but  
8                   the specifications are the same. So what we have here, you  
9                   have the applicants or the inventors discussing warm mixes,  
10                  discussing the prior art review here, they say, Earlier work  
11                  confirms that laboratory compaction of field-produced warm  
12                  mixes utilizing the reported foaming, lubricating solution  
13                  can be adequately compacted at temperatures approximately 30  
14                  to 50 degrees or more below typical hot mix asphalt  
15                  compaction temperatures."

16                  So when warm mix is used in the general sense,  
17                  as here, it's done by reference to it being 30 degrees or  
18                  more or lower than conventional hot mix. Here it says  
19                  typical hot mix. Again, Example 7, same type of structure,  
20                  Your Honor. Warm mix is referenced, they discuss warm mix,  
21                  and then they say, further on in Example 7, the applicants  
22                  say, "This same mixture when produced as a conventional hot  
23                  mix asphalt was mixed at a temperature of 300 to 310 degrees  
24                  Fahrenheit."

25                  So when the term warm mix is used, it's done so

1 in reference to a conventional hot mix.

2 Again, I am not going to belabor this point.

3 But suffice it to say that in Example 3 and Example 6, the  
4 same type of convention is used by the applicants. The  
5 phrase is typical hot mix, again, typical hot mix is used  
6 here. I said I wouldn't belabor the point. This is Example  
7 9, it has a similar convention. Again, they use the phrase  
8 normal hot mix in reference to warm mix.

9 So the comparison just for the term warm mix is  
10 conventional, normal, or typical hot mix.

11 One last piece of additional specification  
12 support, Your Honor. I specifically mention this one  
13 because it comes very close to being lexicographical. It's  
14 very close to being definitional, Your Honor. I won't say  
15 it rises to the level of being a definition. But it comes  
16 about as close as you can to being an actual definition.  
17 So what this is is, this is the WO international application  
18 that is expressly incorporated by reference into the  
19 specification. And in that, the quote is, the first box  
20 there, Your Honor, it says, "Recently, in an attempt to  
21 combine the advantages of hot mix and cold mix processes,  
22 warm mix processes have been reported."

23 And it goes on a bit to discuss this new concept  
24 of warm mix. And then it says, and this is talking about  
25 this prior art international application, it says, "The

1 present invention provides a process for bituminous paving  
2 suitable for primary construction having significantly lower  
3 mixing, paving, and compaction temperatures (temperatures  
4 that are 30 to 80 degrees Fahrenheit lower) than for  
5 conventional hot mix paving."

6 This tracks plaintiffs' proposed construction  
7 for warm mix, 30 degrees or more lower than conventional hot  
8 mix.

9 One note in the prosecution history, Your Honor,  
10 and this is in our joint appendix, this argument was made  
11 several times, twice, in the prosecution history. The  
12 applicants distinguished this Falkiewicz reference, arguing  
13 that Falkiewicz discloses these asphalt binders to  
14 conventional hot mix temperatures. And the applicants say,  
15 "There is no teaching or suggestion in Falkiewicz of warm  
16 mix asphalt paving compositions."

17 So they are using it, it may be called  
18 shorthand, but for them to say Falkiewicz does not have warm  
19 mix, they say, no, no, Falkiewicz has conventional hot mix  
20 temperatures. Here is the temperature range. The invention  
21 is warm mix.

22 That is how the term warm mix is generally used  
23 in the intrinsic evidence.

24 A little bit of extrinsic evidence. I am not  
25 going to belabor this. It is in our brief.

1                   One last piece -- this is extrinsic evidence.  
2       But we do cite a case that said this is particularly  
3       relevant. Defendant Akzo itself, in one of its own patents,  
4       one they have actually raised and one of their defenses  
5       here, this '011 patent of Akzo, the title is Asphalt  
6       Modifiers for Warm Mix Applications. In one of the claims  
7       they say, "The formulation of Claim 14 wherein the  
8       temperature required is 15 to 60 degrees Farenheit lower  
9       than," you guessed it, "conventional hot mix asphalts."  
10      That's the phrase that we think warm mix asphalt is defined  
11      by.

12                   One final slide on warm mix, Your Honor.

13                   So looking at defendants' I will call it new  
14      construction, but their construction, as I said, is taken  
15      verbatim from the claims. The problem with that is, that  
16      verbatim language is also a separate limitation. No one is  
17      reading that out. Plaintiffs understand, we need to meet  
18      that limitation. But there is also the warm mix limitation.  
19      By defining a warm mix as that exact limitation, it renders  
20      the term warm mix superfluous. And we say, and the Federal  
21      Circuit says, Your Honor has said, you don't do that.

22                   So that is essentially all I have on warm mix.  
23      I guess the one additional point is, and I am going to move  
24      to the comparison terms, is that, and there certainly is a  
25      difference, we believe, plaintiffs believe, between the

1 concept of warm mix and the concept of the apples-to-apples  
2 comparison that Mr. Clifford spoke of earlier. And the  
3 apples-to-apples comparison is embodied in the comparison  
4 language, which I will move on to next, unless Your Honor  
5 has any questions.

6 THE COURT: That is fine, Mr. DiGiovanni.

7 MR. DiGIOVANNI: Okay.

8 The next group of terms all the parties have  
9 been calling the comparison terms throughout the briefing,  
10 which ends up being ironic, because defendants end up trying  
11 to read out one of the words comparison, in fact, they  
12 eliminate it. If we can just take a look quickly at what  
13 the comparison terms are. And the definition quoted here is  
14 for comparison temperature.

15 So Claim 25 of the '725 patent claims a warm mix  
16 asphalt paving composition comprising, then it lists some of  
17 the limitations that Mr. Clifford argued.

18 Then toward the bottom, it says wherein the --  
19 this is the asphalt paving composition, "Wherein the warm  
20 mix asphalt paving composition is produced at and is at a  
21 warm mix temperature at least 30 degrees Fahrenheit lower  
22 than a comparison temperature needed to produce a comparison  
23 paving composition containing binder-coated aggregate  
24 without the lubricating additive."

25 As Mr. Clifford touched on, the claimed

1 invention, the composition that's claimed, the temperature  
2 is compared to the comparison temperature needed to produce  
3 a comparison paving composition. So, important is, the  
4 second word comparison there is particularly important,  
5 because it is not compared to the temperature required to  
6 produce any paving composition. As Mr. Clifford said, there  
7 are a lot of different grades, a lot of different types of  
8 paving compositions. There needs to be a comparison of  
9 paving composition. And under plaintiffs' construction,  
10 that word comparison is best understood as comparable.

11 Defendants, on the other hand, read that out  
12 completely.

13 So this slide here, Slide 75, compares  
14 plaintiffs' and defendants' constructions, and you can see  
15 the difference. And the key difference is this word  
16 comparable which is in plaintiffs' construction, and  
17 defendants have completely eliminated that concept of a  
18 comparison product or a comparable product.

19 I will note, Your Honor, there is this  
20 additional language in defendants' construction, this  
21 containing binder-coated aggregate. As we said in our  
22 supplemental brief, we have no issue with that. We don't  
23 think it's necessary, but it's fine to include that in  
24 there. Had they presented that to us during the  
25 meet-and-confer, we certainly would have agreed to it.

1                   So let's take a look at -- we have already  
2           looked at the claim language, Your Honor. The concept of  
3           comparable is embodied in the claim itself by this second  
4           word comparison.

5                   In the specification, if we take a look at Slide  
6           77, it's also, this concept of the claimed invention being  
7           compared to a comparable paving composition, not just any  
8           paving composition, is embodied at least in the example.  
9           So here you have Example 7, Example 11. Example 7 is making  
10          the comparison by saying that the comparison product in  
11          Example 7, Your Honor, is, they say, the same mixture when  
12          produced as a conventional hot mix asphalt. So when the  
13          invention is being compared to this comparison product, they  
14          say it's the same mixture except that it's produced as the  
15          conventional hot mix asphalt. It is not just any comparison  
16          product.

17                   Same with Example 11. It sets forth data  
18          comparing the hot mix version and the warm mix version  
19          essentially of a single type of asphalt composition.

20                   This next slide indicates some prosecution  
21          history. This particular piece of prosecution history, Your  
22          Honor, is directly on point and illustrative of plaintiffs'  
23          construction.

24                   So here you have the applicants explaining an  
25          amendment they made to Claim 1. They say, "Claim 1 has been

1 amended to recite that the listed lubricating additives  
2 provide an asphalt binder composition that allows a  
3 significant reduction in the temperatures used to coat  
4 aggregate for use in paved surfaces compared to similar  
5 asphalt binders that do not include these lubricating  
6 additives."

7 So the comparison product, as described in the  
8 prosecution history, they say it's a similar asphalt binder  
9 that does not include an additive.

10 So it is an apples-to-apples comparison, the  
11 comparison claim language. We, plaintiffs embody that in  
12 their construction, their proposed construction, Your Honor,  
13 by using the word comparable. Defendants eliminate that  
14 second word comparison completely.

15 And on 79, the case law says you can't just read  
16 out a word, a term. That is what defendants are doing.

17 Slide 80 I believe is my final slide on  
18 comparison terms, Your Honor. Essentially, Slide 80 is  
19 intended to emphasize that they have, defendants have used  
20 the word "a" instead of the concept of comparison.

21 So their construction is "the minimum  
22 temperature needed to produce a paving composition  
23 containing binder-coated aggregate without the lubricating  
24 additive."

25 There needs to be a concept of comparable there.

1 We saw in the specification, in the examples, there was  
2 similar, or an apples-to-apples comparison. Plaintiffs'  
3 construction does that by using the word comparable.  
4 Defendants' construction reads it out.

5 Your Honor, that is all I have on the comparison  
6 terms.

7 THE COURT: The word "is"?

8 MR. DiGIOVANNI: That's correct, Your Honor.  
9 The next term is "is produced at, is at." The answer is,  
10 yes, in a way we are disputing the word is. Your Honor,  
11 plaintiffs' construction uses what we believe is not only  
12 the meaning, the commonly understood meaning of "is," but  
13 also the meaning understood and ruled on by the Federal  
14 Circuit, as well as what is in the patent.

15 So the claim language itself, Your Honor --

16 THE COURT: Let's let them swim on this one.  
17 Why don't you move on.

18 MR. DiGIOVANNI: Okay, Your Honor. I was going  
19 to also move on from viscosity modifier and dispersant  
20 viscosity modifier, Your Honor. We didn't receive a  
21 construction from defendants. I think our briefs stand on  
22 their own. We do rely on extrinsic evidence definitions in  
23 contemporaneous documents. But I will move on from that.

24 The last one, just very briefly, Your Honor, is  
25 suitable aggregate. And this is another term where we

1        didn't receive a construction from defendant. And it  
2        appears that defendants' chief complaint is that the word  
3        suitable shouldn't be in a construction or in the term,  
4        number one, or in the construction. I am not sure which  
5        position, maybe they are taking both positions. Certainly,  
6        Your Honor, Slide 91 indicates that. A number of courts  
7        have understood that, including Your Honor in the Talecris  
8        case.

9                    I have nothing else on suitable aggregate. And  
10       that does conclude our opening presentation, Your Honor.

11                   THE COURT: Thank you, Mr. DiGiovanni.

12                   MR. DiGIOVANNI: You are welcome.

13                   THE COURT: Let's hear a response.

14                   MR. DeLUCIA: May it please the Court, Your  
15       Honor, Rich DeLucia for defendants in the case Akzo Nobel  
16       against --

17                   THE COURT: I am assuming you have slides.

18                   MR. DeLUCIA: I do.

19                   I am going to go in a slightly different order,  
20       maybe, to accomplish a little back-to-back, I will go to  
21       warm mix terms first, since those probably are freshest in  
22       everybody's mind, at least in mine, at this point.

23                   THE COURT: However you want to proceed,  
24       counsel.

25                   MR. DeLUCIA: Great. Thank you.

1                   Let's go to our Slide 2.

2                   Your Honor, on the warm mix concept of this  
3                   claim in this patent, the difference in our position was  
4                   articulated at least at one point by opposing counsel when  
5                   they said that the defense is attempting to, or is, in fact,  
6                   proffering to the Court that we should stay very literal to  
7                   the claim language and not introduce concepts or new words  
8                   from the patent specification when it comes to the  
9                   definition of warm mix in the context of this claim, because  
10                  that is precisely what I am proffering to the Court.

11                  This is a claim, Claim 1 of the '725 is to a  
12                  warm mix asphalt composition. We have spoken a lot about  
13                  prior art and background, which do not alter the words of  
14                  the claim, nor the patent specification, nor do I want to  
15                  burden everyone with a discussion of what the prior art now  
16                  review is versus the claim.

17                  The question is, what does the claim define the  
18                  new, allegedly new warm mix to be?

19                  What we are saying is that the text of the claim  
20                  says that, "Wherein the warm mix asphalt paving composition  
21                  of this claim is produced at" means that, then it goes on, a  
22                  warm mix temperature, then it has the so-called comparison  
23                  phrase.

24                  All we are arguing what the difference is is  
25                  that a warm mix is defined within the text of the claim

1 expressly and simply as this comparison of apples-to-apples,  
2 as counsel said, composition with and without the additive.

3 So if it drops 30 degrees without the additive,  
4 and you can't mix at 30 degrees lower temperature without  
5 the additive and compact without the additive at a  
6 30-degree-lower temperature, it is not a warm mix of this  
7 claim.

8 So there is no temperature in the claim, Your  
9 Honor, for warm mix. It is defined in our position by the  
10 comparison that's set forth there. There is no mention of  
11 what a conventional hot mix temperature is. In general,  
12 typically, or conventionally in the art, either in the  
13 specification or in the claim, the word conventional hot mix  
14 appears nowhere in that claim. And warm mix is defined in a  
15 way with respect to this comparison that we have been  
16 talking about.

17 I am going to talk a little bit about why I say  
18 that that is so true.

19 First of all, this warm mix asphalt has, as  
20 claimed, three compositions. The asphalt binders we have  
21 spoken about, the lubricating additive, which is allegedly  
22 new, we say has been in the art -- but that's for another  
23 day -- and the various additives, the sand, the gravel, the  
24 wrap, the reclaimed asphalt pavement.

25 Now, we are talking about literally thousands of

1 potential raw components that can be used, all of which are  
2 different, all of which give rise to different temperatures,  
3 processing conditions, and the like.

4 So generalizing as to what a warm mix is in  
5 general by range of temperatures or even what a conventional  
6 hot mix would be in a range of temperatures with the  
7 universe of different broadly recited components you can  
8 have is why, in fact, there is no definition of a precise  
9 temperature in this claim.

10 Now, why am I saying this?

11 Let's go to the intrinsic evidence that is the  
12 basis of this language in the claim. I would put up right  
13 now, if we can go to Slide 5 -- and I am taking a little  
14 advantage of the background Your Honor already has, that  
15 counsel has provided here, in going right to the very basis  
16 in the patent specification where all this appears.

17 Before going to that, the Patent Office also  
18 noted during reexam prosecution that there are no specific  
19 temperatures in the claims. And that is my Slide 4.

20 Going to Slide 5, here is the basis of the  
21 statement, the actual basis of the statement and the  
22 comparative language in the claims we are discussing, which  
23 defines hot mix right in the text of the claim.

24 What this says is, "Both the first, second and  
25 third embodiments of the present invention," which is all

1 the additives recited by the claims we are discussing, "may  
2 be mixed with aggregate at a temperature of about 280  
3 degrees Farenheit and lower temperatures (where this mixing  
4 temperature may be a function of the original or starting PG  
5 asphalt rate.)"

6 That is the asphalt bitumen which comes in  
7 different grades. We all have some familiarity with  
8 pavement. You can just imagine the variations you could  
9 have.

10 So the specification is not out of order in  
11 saying we don't want to be limited to these temperatures  
12 because of the variety of scientific material you can mix  
13 that would give rise to these different temperatures. And  
14 it says it. But 280 degrees is an example of a warm mix  
15 temperature. But, of course, it's a function of what you  
16 picked as the asphalt binder, a function of your additive.  
17 They talked about there being various amounts of moisture in  
18 aggregate. You go from sand, to ground rock, to aggregate,  
19 any solid material in there, I believe.

20 So the specification says, no one would be  
21 bound, and rightfully so, and that any resultant mixture  
22 "may be compacted at a temperature about 260 degrees and  
23 lower."

24 So there are two different temperatures we are  
25 talking about, lest we not focus on this. One is the mixing

1 of the materials, you mix it in that extruder-like device  
2 they showed, and then you put it in the trough and take it  
3 and pave it, so there is a compaction warm mix temperature  
4 and there is a mixing temperature. What this says is that  
5 hot mix asphalt mixtures produced from the same binders not  
6 utilizing the present invention, which are those additives,  
7 are reasonably anticipated to require mixing temperatures  
8 and compaction temperatures higher than those stated above.

9 And this is just one example from the discussion  
10 in Column 12 that lays this comparison out.

11 So what are we really saying?

12 The specification and the claims say a warm mix  
13 within the context of this variable blend. When you take  
14 out the alleged novel additive, the lubricant, and you make  
15 that composition without the lubricant, the temperature  
16 required for mixing and compaction is 30 degrees higher.  
17 Another way of saying it is, when I add in the additive, I  
18 lower the temperature required for mixing and compaction 30  
19 degrees.

20 That's what the claim says, that's what the  
21 specification explains, why that is the case. The claims do  
22 not say what the warm mix temperature is. It is a way of  
23 broadening the claim. It doesn't say compared anywhere with  
24 any arbitrary conventional hot mix. This patent  
25 specification never says what a conventional hot mix is.

1           You were shown something that was described as  
2   lexicographical from the international EPO application that  
3   is incorporated. But that is a patent on a different  
4   composition entirely. In fact, it's a prior art reference,  
5   which the portion that was said to be lexicographical, which  
6   it really isn't, because what I am showing you here is the  
7   intrinsic evidence that's relevant, is on a completely  
8   different composition and discussing different things.

9           I think it's very far afield and improper to go  
10   to extrinsic evidence to read words into -- that is  
11   extrinsic in the sense that it is dealing with a different  
12   composition of matter even though it is incorporated into  
13   the application.

14           THE COURT: It's your contention what I was  
15   shown is not part of the intrinsic record.

16           MR. DeLUCIA: I believe it's not properly  
17   considered part of the intrinsic record for interpreting  
18   language in this specification, particularly where, Your  
19   Honor, the language of this specification and claims are  
20   consistent completely with what we are saying and what the  
21   claims say and do not include these comparisons with  
22   conventional hot mix temperatures nor conventional warm mix  
23   temperatures.

24           When we said comparison terms, let's go to that  
25   now, because I don't know that the difference between us is

1       understood the same way -- and maybe the difference between  
2       us can be reduced for Your Honor's deliberations in terms of  
3       what these comparison terms are saying.

4               So if we go down -- before I get there, let me  
5       go through with you the difference between our warm mix  
6       temperature constructions.

7               Plaintiffs' proposed construction -- this is my  
8       Slide 6 -- they say warm mix temperature means a temperature  
9       at least 30 degrees lower than used in conventional hot mix  
10      asphalt.

11              I say that is completely incorrect, unnecessary,  
12      uncalled for by the claim language, and unsupported in the  
13      intrinsic evidence, and there is no need to compare the warm  
14      mix with any conventional hot mix. You have to compare  
15      apples to apples, as they said. And I am going to get to  
16      that right now.

17              So let's go to the so-called comparison  
18      language. On my Slide 8 --

19              THE COURT: I have it here.

20              MR. DeLUCIA: On my Slide 8, Your Honor, this is  
21      directly from the claim language, "a comparison temperature  
22      needed to produce a comparison paving composition containing  
23      aggregate without the lubricating additive."

24              So in other words, the standard is the  
25      composition, the paving composition, the control. Like in

1 science you have a control, with and without the drug.  
2 With the drug you are cured; without the drug the patient is  
3 sick.

4 This is like that. It's just like that. It's  
5 saying that with the additive the temperature goes down 30  
6 degrees relative to the comparison temperature, which is the  
7 same blend, the same aggregate, bitumen, or binder without  
8 the additive, which is the logical control, the apples to  
9 apples. And when there is a comparison mixing temperature,  
10 you have to be unable to mix 30 degrees, at a  
11 30-degree-lower temperature without the aggregate. For  
12 compaction, you have to not be able to compact without the  
13 additive at 30 degrees lower.

14 That is precisely what the portions of the  
15 specification I showed you earlier from Column 12 repeatedly  
16 say.

17 It's the same composition compared, and is  
18 compared for the ability, in accordance with Column 12, to  
19 compact or mix.

20 So I think this terminology defines warm mix,  
21 these comparison terms. We did not mean to deviate from  
22 that clear, concise comparison that I see recited in the  
23 claim and supported by the intrinsic evidence.

24 What I do get concerned about, Your Honor, and  
25 what I would -- so we would proffer that the warm mix is

1 defined intrinsically in the claim and in the intrinsic  
2 evidence as the definition of this comparison in the claim  
3 language. And neither party should deviate and add a word  
4 like "a comparable," "comparable." By "comparable," I don't  
5 know what new parameters are being added. But I can assure  
6 you, by not saying a comparison, which is the exact claim  
7 language, we didn't intend to deviate from the  
8 apples-to-apples comparison that the literal claim language  
9 calls for.

10 So the literal claim language, understood to  
11 require a comparison with and without the additive, is  
12 acceptable to defendant. And if without the additive you  
13 require a 30-degree-higher temperature, you cannot mix or  
14 compact within that 30-degree difference that's called for  
15 by the claim, when you compare the same apples-to-apples  
16 comparison, you don't have a warm mix. If it lowers the  
17 temperature 30 degrees from that comparison, when I add the  
18 additive, you do have a warm mix. That's what the claims  
19 say, the spec says, and there is no need to get into  
20 conventional warm mix, conventional hot mix type terms in  
21 light of the intrinsic evidence.

22 That is our conservative view of the Markman  
23 claim construction.

24 Warm mix temperature range, which is another  
25 group of claims, which we discussed, is all subject to the

1 same arguments I have just made, Your Honor, exactly, I  
2 believe.

3 Now, since we are switching back and forth, I  
4 will do another term that I am doing and move on to  
5 non-foamed.

6 So the claims recite non-foamed asphalt binder.  
7 Now, reading it expressly, it is a composition-of-matter  
8 claim. It has the word non-foamed in it. Counsel spoke  
9 about something referred to as incidental foam, and then  
10 said their claim construction should be that, in fact,  
11 non-foamed means not produced using a foaming process, which  
12 was articulated to be a prior art foaming process.

13 So if you don't use a prior art foaming process,  
14 then even though your composition contains foam, it is  
15 non-foamed.

16 Now, I don't know, and the Markman claim  
17 construction doesn't reflect, what even a foaming process  
18 is.

19 They mean by foaming process, and they said, I  
20 believe -- and I don't mean to put words in their mouth --  
21 but I believe they said that a foaming process is the prior  
22 art prior art foaming process. So all they exclude by  
23 non-foamed in a compositional sense is the prior art. Now,  
24 I say, if there is foam in a composition that says  
25 non-foamed composition, and I have foam in the accused

1 product, the argument that that was made by a foaming  
2 process is there. How could I have foam not made by a  
3 foaming process? They say, that is just incidental foam.  
4 That is an infringement argument and not a claim  
5 construction. The claim construction says that the  
6 composition does not contain foam.

7 If it contains foam, it is excluded from the  
8 scope of the claim. If there is foam present and they said  
9 that's not really foam, that's something else, that's  
10 different. But if there is foam present, then the argument  
11 that is excluded by the literal claim language that says  
12 non-foamed is very strong. And it is very unusual to take a  
13 compositional element, call it incidental, read it out of  
14 the claim, and say that the claim to a composition only  
15 excludes prior art foaming processes, because it says  
16 non-foamed asphalt binders. And if there is foam present,  
17 it appears to be expressly excluded from the scope of the  
18 claim.

19 There is no definition of incidental foam.  
20 There is no definition of what they mean by a foaming  
21 process if you have a non-foaming process if you have foam  
22 present.

23 So we are building in a lot with their proposed  
24 construction, a lot of contradiction, I believe, to the  
25 express claim terms. Non-foamed means no foam present in

1 the asphalt binder. If there is foam present, it's  
2 literally excluded by the scope of the claim, and there is  
3 nothing in the prosecution history or in the specification  
4 that ameliorates the express claim language.

5 I believe that's my story or my side of the  
6 story on non-foamed.

7 At this point, Your Honor, I will pass it to my  
8 colleague, Ms. Moken.

9 Thank you very much, Your Honor.

10 THE COURT: Thank you, Mr. DeLucia.

11 MS. MOKEN: I will begin, Your Honor, with the  
12 coating-related terms.

13 THE COURT: Ms. Moken.

14 MS. MOKEN: Yes.

15 Defendants didn't fabricate a requirement for  
16 100-percent complete coating of the aggregate, as plaintiffs  
17 are arguing we did.

18 In fact, it is the patent claims and the  
19 specification that actually require this 100-percent  
20 complete coating. You can look at the claims here. And  
21 coating terms are highlighted for Your Honor. There is no  
22 qualification before the word "coating" or "binder coated"  
23 or "to coat" in any of these claims that says partially or  
24 substantially. It's perfectly clear, we are talking about a  
25 complete coating. That is confirmed in the specification as

1 well.

2 The specification makes clear on numerous  
3 instances that a 100-percent coating of the aggregate is  
4 what is achieved through the use of this process. It's  
5 what's required.

6 The specification also requires a thorough  
7 coating of the aggregate. That is used in a general sense,  
8 in a general discussion about the subject matter claimed in  
9 the patent, that there is a particular temperature needed to  
10 provide a thorough coating of the aggregate.

11 Now, what does thorough mean? Thorough means a  
12 completing coating, a coating without omission. It is not  
13 partial. It is perfect. That is exactly what defendants  
14 have proposed. Defendants have required a construction that  
15 is required by the claims and the specification: An  
16 aggregate 100-percent coated with binder.

17 Plaintiffs have been talking a lot about this  
18 apples-to-apples comparison. And that thorough 100-percent  
19 coating is exactly what the specification and claims require  
20 for there to be an apples-to-apples comparison. And that's  
21 because the degree of coating actually affects the  
22 temperature at which the compositions that are talked about  
23 in the claims need to be mixed. If you will recall, there  
24 is this comparison between the mixing temperature of the  
25 warm mix composition and the lowest necessary temperature

1 needed to produce the comparison composition, which is the  
2 same composition without the lubricating additive.

3 Now, in order to have that apples-to-apples  
4 comparison of these temperatures, there needs to be a  
5 precise end point. And that end point is determined by  
6 having a complete coating. You otherwise can't have an  
7 apples-to-apples comparison, because you will be modifying  
8 the temperature which is needed to have that end point, to  
9 have that comparison composition, and have a precise  
10 temperature comparison to determine if something is falling  
11 within the scope of the claims.

12 Now, what plaintiffs have done here is, they  
13 have tried to rewrite the scope of their claims. And they  
14 want to require having binder on all or substantially all of  
15 the surfaces. Now, there is no discussion of what  
16 substantially all means in the patents. There is no  
17 discussion or even use of the phrase "substantially all"  
18 with respect to coating. And it certainly doesn't appear in  
19 the claims. The claims, as we have talked about, are  
20 unqualified.

21 "Substantially" the courts previously have had  
22 trouble even construing. And that's when the word appears  
23 in the claims themselves.

24 Here, what plaintiffs are doing is trying to  
25 inject this "substantially all" phrase to expand the scope

1 of their claims. And that is impermissible under Markman  
2 doctrine.

3 I will move on to functionally dry and  
4 essentially water free," unless you have any questions.

5 THE COURT: No.

6 MS. MOKEN: "Functionally dry/essentially water  
7 free" is used with respect to a description of the water  
8 content of the asphalt binder.

9 Now, the patent expressly defines what  
10 functionally dry and essentially water free means. In fact,  
11 it says that these phrases are used to mean or intended to  
12 refer to an asphalt binder composition that contains less  
13 water or moisture than is routinely used in conventional or  
14 known warm mixes.

15 Now, when the patentee acts as his own  
16 lexicographer and actually gives an express definition such  
17 as this in the patent, that's what controls. That is the  
18 end of the claim construction analysis. And that definition  
19 must be applied. And it is precisely that definition that  
20 defendants contend should be applied in this instance.

21 Now, what plaintiffs do, on the other hand, is  
22 they modify that definition, that express definition. They  
23 try to say that, oh, conventional means foamed or  
24 emulsified. Not only do they try to say conventional or  
25 known means foamed or emulsified, but they limit it through

1 the use of the "i.e."

2 The patent specification, as you have heard  
3 already, does give examples of conventional warm mixes as  
4 foamed or emulsified. But that's not the end all and be  
5 all. It doesn't say conventional warm mixes mean foamed or  
6 emulsified. And they entirely ignore the fact that  
7 "conventional" is followed by "or known."

8 Plaintiffs stated earlier today when they were  
9 giving their initial presentation that earlier warm mix  
10 technologies do include "foamed asphalt and emulsified  
11 asphalt," and I am quoting, "among others." And that's  
12 exactly what they are ignoring. They are ignoring the  
13 "among others." They are ignoring the "or known" in their  
14 construction. And they are trying to limit it just to this  
15 "foamed or emulsified." And that is impermissible.

16 Plaintiffs also raise the issue of a 112  
17 problem. And they said that defendants' proposed  
18 construction has 112 issues and therefore should not be  
19 adopted. But those same issues that defendants contend  
20 exist with respect to that express definition in the patent  
21 of functionally dry and essentially water free, namely,  
22 routinely used, and the word conventional, because those are  
23 not defined, those still exist with respect to plaintiffs'  
24 construction as well.

25 THE COURT: I don't recall allowing the

1 plaintiff to discuss 112 issues.

2 MS. MOKEN: Your Honor, unfortunately, they did  
3 with respect to this issue. That is the only reason I  
4 address it.

5 THE COURT: I do not think they did, counsel.  
6 I think you should move on.

7 MS. MOKEN: I will. I will move on to "is  
8 produced at and is at," unless you have any other questions.

9 The phrase "is produced at and is at" refers to  
10 the warm mix temperature at which the warm mix composition  
11 is being made. The portion "and is at" that appears in  
12 italics is a portion that was added during reexamination, a  
13 prior reexamination, for the purposes of patentability.  
14 Defendants contend that the only sensible construction of  
15 this phrase is that the composition is produced at that warm  
16 mix temperature and then is at that warm mix temperature,  
17 and that the composition would have to be produced at and be  
18 at that same warm mix temperature to fall within the scope  
19 of this claim.

20 THE COURT: At the produced temperature?

21 MS. MOKEN: Yes, the production temperature.

22 THE COURT: Okay.

23 MS. MOKEN: Plaintiffs' proposed construction,  
24 on the other hand, introduces this nebulous phrase, "at some  
25 point after production." I don't know what that means.

1       They don't define what that means. And that's not talked  
2       about anywhere in the intrinsic evidence.

3               THE COURT: You may not know. But would a  
4       person skill know?

5               MS. MOKEN: I don't believe a person of skill  
6       would know, because it's not part of the intrinsic evidence.  
7       It's something that is newly introduced by plaintiffs here  
8       to change the scope of their claims.

9               What happens here with this construction that  
10       plaintiffs propose is that at some point after production it  
11       actually allows for an increase in the temperature or a  
12       decrease in the temperature of the composition before it's  
13       returned to that production temperature. And that's not  
14       something contemplated anywhere in the intrinsic evidence.

15               So plaintiffs' attempt to modify the scope of  
16       their claims should be met with a rejection of their  
17       construction. And I maintain that defendants' proposed  
18       construction is really the only sensible reading of what  
19       "produced at and is at a warm mix temperature" means.

20               I will move on to "suitable aggregate," unless  
21       you have questions.

22               THE COURT: I have doubt, not questions.

23               MS. MOKEN: Suitable aggregate is a phrase that  
24       is only used in the '466 patent, Claim 20. You can see it  
25       highlighted here in 20, Section (b). What makes the

1       suitable aggregate is nowhere defined in this claim. And  
2       not only is it not defined in the claim, but it's not  
3       defined anywhere in the specification. The only place the  
4       phrase suitable aggregate appears is in a mixture of other  
5       terms describing generally the invention, purported  
6       invention. But there is nothing here that actual tells you  
7       what makes an aggregate suitable in the context of the  
8       claims.

9               Now, we heard earlier today from plaintiffs  
10       about all the many different types of aggregates there are.  
11       They had a picture there that showed all these different  
12       grains and large rocks and small rocks and sand. We have  
13       also heard from them that these aggregates have many  
14       different properties. But there is nothing that identifies  
15       what would make something suitable for use in the  
16       compositions. Just by virtue of the word suitable, that  
17       indicates that there is something that is not suitable as  
18       far as an aggregate goes. Of course, that would want to be  
19       being avoided. There is no guidance provided here.

20               THE COURT: What guidance do you have for me?

21               MS. MOKEN: Unfortunately, I don't.

22               THE COURT: We are not going to talk about  
23       indefiniteness today.

24               MS. MOKEN: No, I am certainly not , Your  
25       Honor. I am just arguing against plaintiffs' construction.

1 THE COURT: Sort of, but sort of you are not.  
2 You are doing both.

3 MS. MOKEN: I don't mean to be.  
4 That concludes my argument on suitable.

5 THE COURT: Very fine, counsel. Thank you.

6 MR. DeLUCIA: Your Honor, we are going to pass  
7 the podium to our co-defendant.

8 I want to clarify one point. We didn't ask or  
9 request a construction separate from Arr-Maz, but by no  
10 means did we intend, as counsel said, to join them on the  
11 terms that counsel for --

12 THE COURT: I didn't take that to be the case.  
13 But it is noteworthy that you didn't offer a separate  
14 construction. You can't run away from that, Mr. DeLucia,  
15 nor can Arr-Maz.

16 MR. LEE: I am glad he clarified, Your Honor.  
17 I was going to clarify that point.

18 Your Honor, Robert Lee on behalf of Arr-Maz  
19 Custom Chemicals.

20 I am only going to address one set of terms.  
21 My colleague, Mr. Abhyankar, will probably very briefly  
22 address another term, Your Honor, that will finish this up.

23 THE COURT: Do you have additional things you  
24 want to say about lubricating?

25 MR. LEE: No, Your Honor. I think counsel did a

1       wonderful job with it.

2                   THE COURT: I hope we are not going to have a  
3       re-do.

4                   MR. LEE: No, Your Honor. We are going to adopt  
5       their arguments and we adopted them in the briefing for the  
6       sake of brevity, and we will adopt them this morning. I  
7       don't have anything specific to add to that. We are just  
8       going to address new terms that Arr-Maz proposed.

9                   THE COURT: Good.

10                  MR. LEE: I assume, Your Honor, you didn't want  
11       to hear it all over again.

12                  THE COURT: No, I don't. Once is enough.

13                  MR. LEE: I am going address a series of terms  
14       referring to the lubricating terms. There is five of them.  
15       We are really only going to --

16                  THE COURT: You can go ahead and get started.

17                  MR. LEE: Yes, Your Honor.

18                  Your Honor, there is five lubricating terms, if  
19       you will, "lubricating," "lubricated," "lubricating  
20       additive," "lubricating substance," and the phrase  
21       "lubricating substance consisting of an anti-stripping  
22       agent."

23                  Your Honor, we are of course not going to go  
24       through all of five of those because they are all pretty  
25       much the same issue for all of them. We are just going

1 highlight the term lubricating, Your Honor.

2 Plaintiff offers a plain and ordinary meaning  
3 construction or an alternative construction. We offer a  
4 specific construction, Your Honor, that we believe is  
5 supported by the specification and the intrinsic record.

6 Your Honor, we would submit that these terms we  
7 believe are very important to the invention. If you  
8 listened to plaintiffs' counsel this morning, you look at  
9 the patent, what they have said is, there is lots of prior  
10 art, warm mix compositions --

11 THE COURT: This is the benefit of not having  
12 that thing (indicating), so you can pay attention to me.  
13 Stop looking over there and look at me.

14 MR. LEE: Yes, Your Honor.

15 The import of this invention is the addition of  
16 additives, if you will, just lubricating additives over the  
17 prior art, that is different than the foamed processes and  
18 the prior emulsions.

19 So, Your Honor, we submit that, therefore, the  
20 key component of the invention is this lubricating element,  
21 that term needs construction. And an ordinary meaning or  
22 plain construction would not be appropriate. How do you  
23 distinguish this invention over the prior art if this is the  
24 key component of that distinguishing feature?

25 Your Honor, we believe the intrinsic record

1 supports that.

2 If you look at Column 2 of the '725  
3 specification, and I am reading, Your Honor, "The  
4 present" --

5 THE COURT: What line are you reading from?

6 MR. LEE: Column 2.

7 THE COURT: Line?

8 MR. LEE: Line 35. "The present invention thus  
9 relies in part in determining that the lubricating  
10 properties of additives added to an asphalt binder or cement  
11 are an important component of the present warm mix asphalt  
12 mixtures and that it is not necessary or essential to use  
13 foamed asphalt binders or emulsified asphalt binders."

14 Again, Your Honor, this lubricating additive,  
15 that is the distinguishing feature. What is lubricating?  
16 Otherwise, someone like my client Arr-Maz would not know  
17 whether they fall within the scope of these claims. For  
18 example, you heard plaintiff refer to my clients used Adhere  
19 with Cecabase. It is a strange name, Your Honor, because it  
20 is a product that contains two additives, if you will, put  
21 in the same drum. Both of those asphalt additives, Your  
22 Honor, were on the market years before this patent was  
23 filed. If you put them in the same drum, Your Honor,  
24 because supposedly they are lubricating, Your Honor, we  
25 think that term needs some meaning.

1                   Your Honor, I am going to destroy this word, but  
2                   we submit that plaintiff acted as his own lexicographer here  
3                   when looking at this term. If you are looking at the patent  
4                   itself, Your Honor, Column 5, Lines 12 through 24, "While  
5                   not intending to be bound by theory, the present invention  
6                   is based in part on the observations that the lubricating  
7                   agents and additives disclosed in this application provided  
8                   warm mix having desired visco-lubricity characteristics or  
9                   properties. As used in this application, the term  
10                  visco-lubricity means a characteristic of a material that it  
11                  exhibits under high rotational velocity as the gap fitness  
12                  of the material being tested approaches zero."

13                  Skipping -- I will read it for completeness.

14                  "As the gap thickness is reduced and as  
15                  rotational velocity is increased, the material's viscosity  
16                  begins to decrease, the normal force between the plates  
17                  begins to increase. A material that has good  
18                  visco-lubricity characteristics will exhibit less than  
19                  normal force increase than one which has poor  
20                  visco-lubricity."

21                  THE COURT: Does it say "depend on" or less  
22                  normal"?

23                  MR. LEE: That says "will exhibit less than  
24                  normal force increase than one which has poor  
25                  visco-lubricity."

1 THE COURT: Given the importance of words.

2 MR. LEE: Yes, Your Honor.

3 Now, we have heard plaintiff complain that we  
4 are using words interchangeably, that the term  
5 visco-lubricity is somehow different than lubricity or  
6 visco-lubricity is different than lubricating. Your Honor,  
7 we submit in that section of the patent, again, Column 5, it  
8 uses those terms interchangeably. The patent doesn't use  
9 with any claim language visco-lubricity. It uses  
10 lubricating, Your Honor.

11 Separately, Your Honor, we have identified or  
12 you heard plaintiff reference that there is a very specific  
13 test in this patent for how you determine what is a  
14 lubricating additive, which referred to this lubricity test.

15 I have to say I was a little surprised their  
16 counsel somehow argued that that lubricity test is somehow  
17 irrelevant or unrelated to this issue. That's this  
18 invention. That's what it is.

19 If you are looking at, again, the patent, it is  
20 going to be on the '725 patent, Column 6, beginning with  
21 Line about 48, Your Honor. It is laboratory testing of  
22 lubricity. There is the word lubricity. I am not a grammar  
23 expert. But here is the argument. That is certainly the  
24 same explanation for the lubricating elements in these  
25 claims. In fact, if you do the test and you look at what is

1 claimed, there is a five-step test. Lubricating additive is  
2 specifically referenced in the test, Claim 3 -- excuse me,  
3 Element 3 of the lubricity test. "A small quantity of the  
4 asphalt cement or asphalt cement plus lubricating additive  
5 was added to the bottom of the cup." This is the test they  
6 are running to determine the lubricating elements.

7 We will get to Element 5 of this five-step test  
8 at the beginning of Column 7, Your Honor. "The test we used  
9 is a steady sheer test with increasing velocity." Reading  
10 down, Your Honor, to the last sentence, last two sentences,  
11 "In addition, normal force increases, attempting to force  
12 the plates apart. The more lubricating character an  
13 additive has, the lower these normal forces are."

14 Again, Your Honor, they use the term lubricity  
15 or lubricating or visco-lubricity interchangeably to  
16 describe the same element of the invention. This is the  
17 invention, Your Honor, the lubricating characteristics of  
18 the additive, apart from the foaming and emulsification.  
19 Because there is no available test, Your Honor, they invent  
20 one to somehow claim this test is irrelevant to the  
21 construction. Your Honor, it is completely unfounded.

22 Looking to the construction itself, Your Honor,  
23 specifically, we propose a construction of lubricating is to  
24 provide a reduction in the normal force of an asphalt binder  
25 with an additive as compared to the normal force of the

1 asphalt binder without the additive at high rotational  
2 velocities.

3 Again, Your Honor, this tracks the language  
4 specifically from the specification, Your Honor, to define  
5 really what is the novel element of these claims, apart from  
6 the prior art processes.

7 Thank you, Your Honor.

8 THE COURT: Thank you, Mr. Lee.

9 MR. LEE: With your admonition about 112 issues  
10 clear, Mr. Abhyankar is going to briefly touch on the last  
11 two terms.

12 THE COURT: Good morning, counsel.

13 MR. ABHYANKAR: Very briefly, Your Honor. We  
14 are going to be talking about the viscosity modifier and  
15 dispersement viscosity modifier terms. If you recall,  
16 counsel indicated that they have relied on extrinsic  
17 evidence for their construction.

18 THE COURT: They did say that.

19 MR. ABHYANKAR: There is a reason for that:  
20 because there is no intrinsic support for their  
21 construction. And I just wanted to point that out.

22 I also wanted to point out that their intrinsic  
23 evidence is two patents on unrelated technology and  
24 unrelated patents to the patents in suit. So we think that  
25 those patents are completely irrelevant to this

1 construction.

2 Thank you.

3 THE COURT: Thank you, counsel.

4 Does that complete the defendants' presentation?

5 MR. LEE: That does for us, Your Honor.

6 THE COURT: There is a fair amount to which  
7 plaintiffs have to respond. Let's take a quick stretch.

8 (Recess taken.)

9 THE COURT: Please, take your seats.

10 Let's have our reply.

11 MR. CLIFFORD: Your Honor, if I may, I would  
12 like to speak to just four terms briefly. Then I will turn  
13 it over to Mr. DiGiovanni, who will speak on a couple more  
14 terms.

15 THE COURT: I hope one of you is going to  
16 address Mr. DeLucia's assertions regarding what you relied  
17 on and what you didn't, among other things.

18 MR. CLIFFORD: Yes. I believe Mr. DiGiovanni  
19 will.

20 If you could bring up Slide 30, please.

21 Your Honor, this is the non-foamed term.  
22 Counsel said in the presentation that they don't know what  
23 foaming process means or refers to. I would submit, Your  
24 Honor, that foaming process is clear and unequivocal to a  
25 person of ordinary skill in the art. We went through

1 multiple slides from the specification, from the  
2 incorporation of the WO, European application, which is  
3 expressly incorporated by reference into the specification,  
4 is intrinsic evidence. And I would submit to Your Honor  
5 that we don't have to spell out in detail a definition of  
6 foaming process because it's clear in the specification what  
7 foaming process refers to and it's known to what a person of  
8 ordinary skill would know.

9 So it's not required under Federal Circuit law  
10 to incorporate into the specification what a person of  
11 ordinary skill knows.

12 Nevertheless, Your Honor --

13 THE COURT: I agree with that. I think perhaps  
14 Ms. Moken didn't understand my question. I don't know.

15 MR. CLIFFORD: Thank you, Your Honor.

16 The other issue having to do with foam is,  
17 counsel said that the patent states that the invention does  
18 not contain foam. Well, I would submit, Your Honor, that  
19 the specification nowhere says that no foam anywhere is  
20 required. In fact, we did not see a single citation from  
21 the defendants to the intrinsic evidence, whereas for  
22 purposes of our proposed definition we cited numerous  
23 examples of what foamed and foaming requires.

24 So it doesn't say no foam anywhere.

25 If you could move to Slide 40.

1 I am going to now address the coating claim  
2 term, Your Honor.

3 With respect to coating, counsel said, We, the  
4 defendants, didn't fabricate the coating requirement.  
5 Well, of course, they didn't, because the coating  
6 requirement is in the claims. I never suggested that it was  
7 in any way the defendants who created a coating requirement.  
8 Sure, it's there in the claim terms. But what they are  
9 doing is ignoring the characterizations of the coating  
10 requirement that are replete throughout the specification.

11 So the defendants want perfection. You heard  
12 that this morning. It must be perfect. Well, first off, it  
13 doesn't say perfect. It was extrinsic evidence that they  
14 relied upon for some definition of thorough to require  
15 perfection. Instead, what we see is characterizations in  
16 the specification for acceptable, well coated, good coating,  
17 adequate, as well as thorough, and 100 percent. I would  
18 suggest that, taken as a whole, those words do not equate to  
19 perfection.

20 And if you could go to Slide 41, please.

21 The defendants are ignoring these keywords like  
22 adequate, good, well coated, and acceptable.

23 If you would move to Slide 25, please.

24 I am going to just very briefly with one comment  
25 address the functionally dry, essentially water free claim

1 term.

2 Counsel said this morning that we are modifying  
3 this express definition cited in the paragraph on Slide 25.  
4 While we do rely on that paragraph and we believe that that  
5 paragraph is important in construing functionally dry and  
6 essentially water free, we don't believe that we are  
7 modifying. What we are clarifying is to defend against any  
8 argument as to what conventional or known warm mixes mean,  
9 because, in fact, the patentees, in the previous sentence,  
10 they told us exactly what conventional warm mixes means.  
11 They told us that it means foamed or emulsified asphalt  
12 binders.

13 So we are not ignoring any aspect of the scope  
14 of known, conventional or known warm mixes. What we are  
15 trying to do with our proposed definition is take the  
16 express definition and make it clear from the previous  
17 sentence as to what the full scope of the meaning of  
18 conventional or known warm mixes is.

19 Then I would like to conclude, Your Honor, with  
20 lubricating.

21 Slide 57, please.

22 You will recall, Your Honor, that counsel for  
23 the defendants spoke about a very specific test that is set  
24 forth in the specification. And he said that I said it was  
25 irrelevant or unrelated. I did not say those words, Your

1 Honor. I know that it is in the specification.

2 What is clear is that the test is a way for the  
3 patent to describe observations of the effects of the  
4 invention. The test is not the invention itself.

5 So the lubricity effects can be measured through  
6 the testing. Lubricating is not the same.

7 That is all I have, Your Honor.

8 THE COURT: Thank you, counsel.

9 Mr. DiGiovanni.

10 MR. DiGIOVANNI: Thank you, Your Honor.

11 Mr. Thomas, if you could put up Slide 68.

12 So, Your Honor, I will address warm mix briefly  
13 in response to Mr. DeLucia's statements.

14 First and foremost, Mr. DeLucia made reference  
15 to the WO international application. That, in fact, was  
16 expressly incorporated by reference, as you see in the  
17 bottom here, '725 patent, Column 1, Lines 15 to 16, "It is  
18 incorporated by reference herein." That makes it intrinsic  
19 evidence. In fact, you don't even need to incorporate it by  
20 reference. It's just referenced. It's intrinsic evidence.

21 Certainly, this is intrinsic evidence, This WO  
22 application.

23 This is the particular language where I said it  
24 comes very close to being definitional, about warm mix.

25 So in this particular passage, very important

1 passage, the applicants -- actually, I think it's one of the  
2 same common inventors on this -- but this reference  
3 certainly references warm mix, and it makes reference to it  
4 by pointing to temperatures 30 to 80 degrees lower than  
5 conventional hot mix.

6 So, in general, I didn't hear Mr. DeLucia  
7 address a dilemma that happens if their construction were to  
8 be adopted. That is, they render the comparison limitation  
9 completely superfluous. It would actually have that  
10 limitation in there twice. And the case law says you don't  
11 do that.

12 What we tried to do, we went through the  
13 specification and the intrinsic evidence and some extrinsic  
14 evidence and came up with a definition of what is  
15 understood, not to the lawyers, but to the person of  
16 ordinary skill in the art, what does warm mix mean. And  
17 that's what we have done. I don't need to repeat it, Your  
18 Honor.

19 Comparison, the comparison term, Mr. DeLucia, I  
20 think he conceded it four or five times, that the comparison  
21 needs to be apples to apples.

22 THE COURT: He did say that.

23 MR. DiGIOVANNI: Mr. DeLucia also said we did  
24 not mean to deviate from the claim language. But defendants  
25 certainly did deviate from the claim language. They took

1     that second word comparison, which is very critical to the  
2     apples-to-apples comparison, and they eliminated it. They  
3     used the word "a." Completely eliminates. So it could be  
4     apples to bananas or pears or something else, Your Honor.

5             We would say our language, our word, comparable,  
6     captures the meaning of the comparison limitation.

7             If you could bring up Slide 86.

8             I sensed Your Honor didn't want to hear any more  
9     about is produced at and is at, except that the result of  
10    the defendants' construction would be for an eternity you  
11    would have to have a road that is essentially at a  
12    production temperature.

13            Suitable aggregate, if we can go to Slide 91.

14            Again, I guess what I heard was some criticism  
15    of using the word suitable. That's a word that has been  
16    used a number times. I didn't hear a response to this. I  
17    know Your Honor construed the same term.

18            If you go two slides later, to 93.

19            Your Honor, I will not talk about this. This is  
20    extrinsic evidence of our expert. But I will note that the  
21    construction, of course, has to be done from the  
22    consideration of the person of ordinary skilled in the art  
23    as to what they understand. And in our briefing, we  
24    certainly set forth what that person was, what the  
25    educational components and experience component was. And

1       that's the person that you need to look at as to what the  
2       terms mean. Defendants never actually gave us a person so  
3       skilled, so I am not sure they adopted ours or any other  
4       person. But I think our briefing is straightforward on who  
5       the person of ordinary skill is and what that person  
6       understands.

7                       Finally, Your Honor, viscosity modifier and  
8       dispersant viscosity modifier. In Slide 87 we do point to  
9       some intrinsic evidence. In the '466 patent and the '725  
10      patent at Column 4, those terms are used. And it's followed  
11      by a number of types of chemical compounds that fall within  
12      that.

13                     Our definition tries to capture what those terms  
14      mean. And we do refer to extrinsic contemporaneous  
15      documents for definitional purposes. But by no means would  
16      we think that means that it is indefinite or otherwise  
17      undefined.

18                     Your Honor, that is all I have.

19                     THE COURT: Thank you, counsel.

20                     I will do my best to get an order out in 30  
21      days, give or take.

22                     Is there anything that we need to talk about  
23      while I have you all in town? Or is everything going  
24      smoothly?

25                     Good. Counsel, thank you.

1 (Counsel respond "Thank you, Your Honor.")

2 - - -

3 Reporter: Kevin Maurer

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